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FILED

No. 08- 08-846 JAN 5 - 2009

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IN THE

Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Forest Service has authorized a ski resort to begin spraying millions of gallons of recycled sewage water (in the form of artificial snow) onto the most sacred mountain of southwest Native American tribes – a site that is a wellspring of the tribes' spirituality and that serves an indispensible role in their religious practices and rituals. The tribes contend that this authorization violates the Religious Freedom Restoration Act ("RFRA"), under which the federal government may not "substantially burden" a person's exercise of religion unless its action is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. A divided en banc panel of the Ninth Circuit rejected this claim at its threshold, holding that a "substantial burden" exists under RFRA "only when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Pet. App. 20a. Spraying sewage water onto the mountain would do neither of these particular things, notwithstanding the profound impact it would have on the tribes' spirituality and religious practices.

The question presented, over which there is widespread disagreement among the circuits, is:

Whether a governmental action cannot constitute a "substantial burden" under RFRA unless it forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.

PARTIES TO THE PROCEEDINGS BELOW

The following parties were plaintiffs below and are petitioners here: Navajo Nation, Havasupai Tribe, Rex Tilousi, Dianna Uqualla, White Mountain Apache Nation, Yavapai-Apache Nation, The Flagstaff Activist Network, Hualapai Tribe, Norris Nez, Bill Bucky Preston, and Hopi Tribe.

The Sierra Club and the Center for Biological Diversity were also plaintiffs below but are not petitioners here.

The following parties were defendants below and are respondents here: The United States Forest Service, Nora Rasure (in her official capacity as Forest Supervisor, Coconino National Forest), Harv Forsgren (in his official capacity as Regional Forester, appeal deciding office). The Arizona Snowbowl Resort Limited Partnership was a defendant-intervenor below and is also a respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-113a) is published at 535 F.3d 1058. The panel opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 114a-185a) is published at 479 F.3d 1024. The district court's order (Pet. App. 186a-267a) is published at 408 F. Supp. 2d 866.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2008. Pet. App. 3a. On October 29, Justice Kennedy granted an extension of time and then on November 20, 2008 granted a further extension until January 5, 2009, in which to file a petition for certiorari. App. No. 08-368. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this brief reproduces the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, at Pet. App. 268a-280a.

STATEMENT OF THE CASE

1. The Religious Freedom Restoration Act ("RFRA") provides that "Government shall not substantially burden a person's exercise of religion" unless the governmental action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Congress enacted this landmark legislation following this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which held that the First Amendment's Free Exercise Clause does not require the government to advance a compelling justification for taking generally applicable actions that impact individuals' exercise of religion. Congress believed that *Smith* "virtually eliminated the [previous] requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Accordingly, Congress sought "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

Notwithstanding RFRA's references to this Court's case law, this Court explained in *City of Boerne v. Flores*, 521 U.S. 507, 532-35 (1997), that the Act affords much broader protection to religious exercise than does the First Amendment. Congress understood RFRA to apply, among other things, to "autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious

beliefs, and [to] zoning regulations and historic preservation laws . . . which, as an incident of their normal operation, have adverse effects on churches and synagogues." *Id.* at 530-31 (citing the legislative history of RFRA, including S. Rep. No. 103-111, at 8 (1993)). Indeed, even though "[c]laims that a law substantially burdens someone's exercise of religion will often be difficult to contest," "[a]ny law is subject to challenge at any time by an individual who alleges a substantial burden on his or her free exercise of religion." *Id.* at 532, 534.

While Congress lacks the constitutional authority to apply such an accommodating conception of religious freedom to state and local governments, *id.* at 535-36, RFRA applies with full force to the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 & n.1 (2006).[1]

2. a. For centuries, the religious practices of Native American tribes in the Southwest United States have revolved around a mountain in Arizona known as the San Francisco Peaks. The tribes, as acknowledged by the U.S. Forest Service's regional archaeologist, view the Peaks generally as (a) "a home of spiritual beings; (b) a place where significant

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[1] In response to *Boerne*, Congress partially reinstated RFRA's application to state and local governments in the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.* RLUIPA applies RFRA's compelling interest test to state regulation of land use. 42 U.S.C. § 2000cc(a)(1). It also expands RFRA's definition of "exercise of religion." *Id.* § 2000cc-5(7)(A).

mythological events occurred; (c) a place where spirits of the dead went to be changed into bringers of rain; (d) a personification of gods and goddesses; (e) an area where important societies originated; and (f) as a source of life." Pet. App. 226a (district court's summary of testimony from Dr. Judith Propper, Archeologist for the Southwestern Region of the Forest Service). By way of specific examples:

• The Navajo revere the Peaks as "'the Mother of the Navajo People,' their essence and their home," and "the holiest shrines in the Navajo way of life." Pet. App. 227a. That being so, the mountain "has a unique religious significance on their daily religious lives; it has complete bearing on their daily personal lives and the longevity of existence for these members of the tribe, and has complete connection with daily songs and prayers to their supernatural beings." U.S. FOREST SERVICE, FINAL ENVIRONMENTAL STATEMENT: ARIZONA SNOW BOWL SKI AREA PROPOSAL ("1979 FEIS") 57 (1979).

• "The San Francisco Peaks are the spiritual essence of what Hopis consider the most sacred landscapes in Hopi religion." 1 U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS ("2005 FEIS") 3-9 (2005). The Hopi believe that the Peaks are "a point in the physical world that defines the Hopi universe and serve[] as the home of the Kachinas, who bring water, snow, and life to the Hopi people." Pet. App. 238a. These Kachinas are central to the Hopi way of life. "The Hopi calendar connects the months and seasons in the Hopi year, the coming and going of the Kachina

from the Peaks, and the ceremonies performed in the kivas on the Hopi Reservation." Pet. App. 239a.

• The Havasupai view the Peaks as "the origin of the human race; it is the point of their creation." Pet. App. 233a; *see also* 2005 FEIS at 3-13. They "pray to the Peaks and visit them spiritually daily. . . . [T]raditional practitioners of the Havasupai religion deem the entirety of the Peaks as one living being and that portions of the mountain cannot be carved out from the whole." Pet. App. 234a.

• The Hualapai likewise view the Peaks as their point of creation – a place where a young girl survived a flood that covered the whole Earth and conceived life from the mountain's springs. Pet. App. 86a (Fletcher, J., dissenting).

Southwestern tribes also incorporate the Peaks into their daily religious experiences in more tangible ways, collecting natural resources directly from the mountain for their spiritual rituals. The Navajo collect materials from the Peaks to form "medicine bundles," which the Navajo place in almost every household as a symbol of the Peaks and as a means of maintaining a connection with the divine. Pet. App 84a; 2005 FEIS at 3-11. The Navajo consider the medicine bundles to be their "Bible." They are the "centerpiece" of the Navajo's most important ceremony, the Blessingway, which is used to ensure wellbeing and prosperity. Pet. App. 9a.

The Havasupai similarly "have gathered from the Peaks ceremonial items, food, water and fallen trees for fuel for hundreds of years and still use such articles today." Pet. App. 234a. The Hualapai collect sacred plants, herbs and earth from the mountain,

which they incorporate into numerous religious rituals. The mountain also is the only location where the Hualapai can collect water for ceremonial purposes and for healing the sick. The Hopi undertake "annual pilgrimages and collecting expeditions" to the Peaks, 2005 FEIS at 3-10, gathering water and boughs from Douglas fir trees for religious ceremonies. 2005 FEIS at 3-17 to -18.

b. The Arizona Snowbowl ski area is located on a 777-acre tract of federal forest land on the Peaks. It thus operates under a special use permit issued by the U.S. Forest Service. In 2002, the Snowbowl requested permission to expand the ski area and to begin spraying up to 1.5 million gallons a day of treated sewage effluent as artificial snow onto the mountain. Pet. App. 199a, 221a-223a. Over the objections of numerous Native American tribes, the Forest Service approved this proposal. Pet. App. 190a.

The sewage water the Snowbowl proposes to use includes "wastes from toilets, baths, sinks, lavatories, laundries, and other plumbing fixtures in places of human habitation, employment, or recreation." ARIZ. ADMIN. CODE § R18-11-301 (2008). Even after processing, "the resulting effluent has detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia." Pet. App. 137a (citing 2005 FEIS at 3-199). It may contain

fecal coliform organisms up to a concentration of 23/100ml. ARIZ. ADMIN. CODE § R18-11-303(B)(2)(b).[2]

3. a. Petitioners are several tribes residing near the Peaks, certain individual tribal members, and a local tribal interest group. Following an unsuccessful administrative appeal, Pet. App. 190a, petitioners sued the Forest Service in the United States District Court for the District of Arizona alleging, *inter alia*, that the Forest Service's approval of the use of recycled sewage violates RFRA. Pet. App. 214a.[3]

The district court conducted an eleven-day bench trial, making multiple findings of fact on the importance of the Peaks to petitioners' spirituality and religious practices. Nonetheless, the district court denied relief, holding that spraying sewage water on the Peaks would not substantially burden petitioners' exercise of religion. Pet. App. 261a. The district court also concluded that the Forest Service's

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[2] Arizona regulations prohibit the use of recycled sewage water for human consumption, "swimming, wind surfing, water skiing, or other full-immersion water activity with a potential for ingestion," and require signs if reclaimed water is used. ARIZ. ADMIN. CODE § R18-9-704(G)-(H) & tbl.1. Regulations further require that a person irrigating with reclaimed sewage prevent the effluent from coming into "'contact with drinking fountains, water coolers, or eating areas.'" Pet. App. 106a (citing ARIZ. ADMIN. CODE § R18-9-704(F)).

[3] Petitioners also brought claims under the National Environmental Policy Act, the National Historic Preservation Act, the National Forest Management Act, the Grand Canyon Enlargement Act, the Endangered Species Act, and a claim for Breach of Trust. *See* Pet. App. 192a-214a. The district court rejected these claims on summary judgment, *id.*, and the Ninth Circuit affirmed. Petitioners do not press these claims here.

decision was the least restrictive means of furthering various compelling interests related to recreational skiing. Pet. App. 247a-249a.

b. A three-judge panel of the Ninth Circuit unanimously reversed. Pet. App. 118a. Following circuit precedent, the panel explained that a substantial burden is one that "prevent[s] the plaintiff from engaging in [religious] conduct or having a religious experience." Pet. App. 146a (quoting *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (internal quotation marks omitted) (alterations in original). The panel held that petitioners demonstrated such a burden in two ways. First, spraying reclaimed sewage water on the mountain would render petitioners "unable to "perform [] particular religious ceremon[ies], because the ceremon[ies] require[] collecting natural resources from the Peaks that would be too contaminated – physically, spiritually, or both – for sacramental use." Pet. App. 139a. Second, spraying sewage water on the mountain would impede "daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination." Pet. App. 139a-140a.

The panel also held that the Forest Service's authorization failed both prongs of RFRA's compelling interest test. The panel reasoned that "the use of artificial snow at an already functioning commercial ski area in order to expand and to improve its facilities, as well as to extend its ski season in dry years, is [not] a governmental interest 'of the highest order.'" Pet. App. 150 (quoting *Yoder*,

406 U.S. at 215). And the panel determined that the Forest Service had less restrictive means at its disposal for accomplishing any goal of improving safety at the Snowbowl. Pet. App. 152a.

c. At the government's and the Snowbowl's urging, the Ninth Circuit reheard the case en banc and, by divided vote, reinstated the district court's judgment. The en banc majority did not dispute that the authorized reclaimed sewage discharges would "substantially burden" tribal religious practices under circuit precedent or even the phrase's ordinary meaning. But the majority asserted that it had to give the phrase a narrower meaning than the words themselves suggest because the phrase "substantial burden" is "a term of art" that is limited to the types of burdens imposed in *Sherbert* and *Yoder*. Pet. App. 7a. Based on the specific facts of those two cases, the majority overruled circuit precedent and held that "[u]nder RFRA, a 'substantial burden' is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of criminal or civil sanctions (*Yoder*)." Pet. App. 20a (emphasis added). The majority added that it believed that giving "substantial burden" its ordinary meaning would create an untenable situation in which "any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens." Pet. App. 7a.

Applying its newly restrictive construction of RFRA, the majority held that spraying sewage water onto the Peaks would not substantially burden

petitioners' exercise of religion. It would not condition a governmental benefit on petitioners' abstaining from any religious exercise or coerce petitioners into ceasing any such exercise; it would merely, in the Ninth Circuit's words, "offen[d]" them and "decrease the spiritual fulfillment [they] get from practicing their religion on the mountain." Pet. App. 6a-7a; *see also* Pet. App. 21a n.12.

Three judges, per an opinion authored by Judge William Fletcher, dissented. In their view, a "substantial burden," tracking the plain and ordinary meaning of the phrase, means "hinder[ing] or oppress[ing] the exercise of religion to a considerable degree." Pet. App. 55a (internal quotations omitted). And nothing in RFRA's text or purpose requires limiting the term to the facts of *Sherbert* and *Yoder*. Pet. App. 55a-56a. Neither case uses that term, much less suggests that the government impermissibly burden religious exercise only when it invokes one of the two particular mechanisms at issue in them. Pet. App. 58a-60a.

Applying its definition of "substantial burden," the dissent found it "self-evident," Pet. App. 97a, that spraying recycled sewage on the Peaks substantially burdens petitioners' exercise of religion. Pet. App. 89a-97a. The dissent rejected the majority's emphasis on physical harm and concrete compulsion, stating that it "ignores the nature of religious belief and exercise, as well as the nature of the inquiry mandated by RFRA. . . . Contrary to what the majority writes, and appears to think, religious exercise invariably, and centrally, involves a 'subjective spiritual experience.'" Pet. App. 75a-76a.

The dissent, following the panel decision, also determined that the Forest Service's decision to allow the Snowbowl to spray sewage water on the Peaks failed both prongs of RFRA's compelling interest test. Pet. App. 98a-100a.

REASONS FOR GRANTING THE WRIT

Congress enacted RFRA "[t]o assure that all Americans are free to follow their faiths free from governmental interference." S. Rep. No. 103-11, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897. An individual invokes the statute's protections by showing that a governmental action "substantially burdens" religious exercise. Yet during the fifteen years in which RFRA has been on the books, this Court has never construed this central and often determinative provision of the statute. Meanwhile, the federal courts of appeals have adopted divergent rules, culminating with the en banc Ninth Circuit's decision to discard the plain meaning of the phrase as it relates to so-called "subjective" spiritual expression or fulfillment. Pet. App. 6a, 21a n.12.

It is time for this Court to step in. RFRA is too important a statute to allow the lower courts to continue floundering in a state of confusion and disarray. This case presents an ideal vehicle for bringing order to the "substantial burden" requirement: it implicates the current splintering of authority, and it presents the issue in the recurring context of Native Americans' religious exercise that is tied to land. Finally, the Ninth Circuit's holding that RFRA's protections do not apply when the governmental actions desecrate holy sites or otherwise interfere with individuals' "subjective

spiritual experience[s]," Pet. App. 6a, is incorrect. It limits RFRA's coverage in ways that its language does not allow and that frustrate its purpose. Indeed, as Judge William Fletcher observed in dissent, "[i]f Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be." Pet. App. 113a.

I. The Federal Courts Of Appeals Are Deeply Fractured Over What Constitutes A "Substantial Burden" Under RFRA.

The question of what constitutes a "substantial burden" on religious exercise – the gateway to RFRA's compelling interest analysis – has deeply fractured the courts of appeals. The nine federal circuits to consider this question have split broadly into three groups, with variations existing even within these categories. This inconsistency has been growing for more than a decade and is now considered, openly acknowledged, and entrenched.

A. The Circuits Have Adopted Three Different Approaches To The "Substantial Burden" Concept.

1. The Ninth Circuit's en banc decision adopts the narrowest possible test for identifying when government action substantially burdens religious exercise. Under this test, "a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a government benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanction." Pet. App. 20a (emphasis added). In other words, the Ninth Circuit limits the

notion of a substantial burden to the particular mechanisms by which the government impacted religious practices in *Sherbert* and *Yoder*. According to the Ninth Circuit, any other type of burden on religious practices cannot constitute "a 'substantial burden' within the meaning of RFRA," and thus cannot trigger any of the statute's protections. Pet. App. 20a.

The Fourth and D.C. Circuits share the Ninth Circuit's restrictive conception of substantially burdening religious exercise. In *Goodall v. Stafford County School Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996), the Fourth Circuit rejected a RFRA claim because the plaintiffs "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take." Similarly, the D.C. Circuit has held that a substantial burden exists only where a "regulation forces [religious adherents] to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001) (citing *Goodall*, 60 F.3d at 172-73), *cert. denied*, 535 U.S. 986 (2002).

2. The Eighth and Tenth Circuits have adopted a much broader conception of "substantial burden." Under the Tenth Circuit's definition, the government substantially burdens religious exercise when it "significantly inhibit[s] or constrain[s] [religious] conduct or expression[;] . . . meaningfully curtail[s] [an individual's] ability to express adherence to his or her faith; or [] den[ies] [an individual] reasonable opportunities to engage in those activities that are

fundamental to [an individual's] religion." *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (citation omitted), *cert. denied*, 515 U.S. 1166 (1995).[4]

The Eighth Circuit expressly has adopted the Tenth Circuit's test. *See In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (citing *Werner*), *vacated on other grounds sub nom. Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997) (same). In doing so, the court explained – in direct contrast to the Ninth Circuit (*see* Pet. App. 6a, 20a) – that it is not "relevant" to the substantial burden inquiry whether individuals "can continue" to engage in the religious practice at issue. *In re Young*, 82 F.3d at 1418. All that matters is whether the governmental action causes religious adherents, by virtue of their subjective beliefs, to "meaningfully curtail[] . . . a religious practice of more than minimal significance." *Id.*

The Eighth Circuit has continued to adhere to this test in a more recent case involving the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, which uses the "same" substantial burden standard as RFRA, *O Centro*, 546 U.S. at 436. *See Murphy v. Missouri*

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[4] A panel of the Tenth Circuit questioned the circuit's *Werner* standard in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661-62 (10th Cir. 2006). *See also Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996), *cert. denied*, 519 U.S. 821 (1996). But the full court denied rehearing en banc. *Grace*, 451 F.3d at 675. *Werner* thus remains the law of the circuit.

Dep't. of Corrections, 372 F.3d 979, 983, 988 (8th Cir.) (citing *Weir*), *cert. denied*, 543 U.S. 991 (2004). And the Eighth Circuit has reaffirmed its standard in response to express disagreement by the Third Circuit. *Compare Washington v. Klem*, 497 F.3d 272, 280 n.60 (3rd Cir. 2007) (criticizing *Murphy*), *with Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) (continuing to apply the *Werner/Murphy* standard).

The recent decision in *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), illustrates just how significantly the law in the Eighth and Tenth Circuits diverges from that in the Ninth, Fourth, and D.C. Circuits. In *Comanche Nation*, a Native American tribe challenged the government's plan to build a military training facility directly south of the Medicine Bluffs, a site "held in deep reverence by the Indian Tribes of the area from time immemorial." *Id.* at *6. For these tribes, "the unobstructed view of all four bluffs is central to a spiritual experience of the Bluffs." *Id.* at *7. Explicitly rejecting the government's request to apply the Ninth Circuit's restrictive definition of "substantial burden" in place of the Tenth Circuit's *Werner* test, *id.* at *3 n.5, the *Comanche Nation* court held that RFRA's threshold requirement was satisfied because the governmental action would significantly inhibit the "spiritual experience" of tribal members. *Id.* at *17.[5]

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[5] After the Comanche Nation obtained a preliminary injunction from the district court, the government canceled its plans to build the military training facility. The government

3. Between these two poles, four other circuits have adopted various intermediate standards that are broader than the approach taken by the Ninth, Fourth, and D.C. Circuits but narrower than the approach taken by the Eighth and Tenth Circuits.

The Seventh Circuit holds that a "regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental *responsibility* for rendering religious exercise . . . *effectively impracticable*." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004) (emphasis added).[6] While this definition is broader than the Ninth Circuit's coercion requirement, the Seventh Circuit also asserted in adopting it that the Eighth and Tenth Circuits' construction of "substantial burden" "cannot be correct." *Id.*

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has filed a motion to dismiss this case as moot. U.S. Mot. to Dismiss, *Comanche Nation v. United States*, at 2, No. CIV-08-849-D (D. Okla. Oct. 30, 2008).

[6] Until 2003, the Seventh Circuit followed the "broad[] definition" of substantial burden that the Tenth Circuit enunciated in *Werner*. *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996) (citing *Werner*, 49 F.3d at 1480), *vacated on other grounds*, 522 U.S. 801 (1997); *see also McNair-Bey v. Bledsoe*, 165 F.3d 32 (7th Cir. 1998); *Arguello v. Duckworth*, 106 F.3d 403 (7th Cir. 1997); *Cubero v. Burton*, 96 F.3d 1450 (7th Cir. 1996). Following the passage of RLUIPA, a divided panel in *Urban Believers* abandoned the *Mack* formulation in favor of the "effectively impracticable" rule. While the precise bounds of this "impracticability" test are unclear, it appears to afford narrower protection to religious practices than the *Mack* standard.

Although neither the Fifth Circuit nor the Third Circuit have defined the substantial burden standard in the RFRA context, both courts have addressed the "same standard," *O Centro*, 546 U.S. at 436, under RLUIPA, and have adopted another intermediate approach. After noting that "the courts that have assayed [the definition of substantial burden] are not in agreement," *Adkins v. Kaspar*, 393 F.3d 559, 568 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005), the Fifth Circuit concluded that:

> government action or regulation creates a 'substantial burden' on a religious exercise if it *truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs*. . . . On the opposite end of the spectrum, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Id. at 570 (emphasis added); *accord Longoria v. Dretke*, 507 F.3d 898, 903 (5th Cir. 2007). Unlike the Ninth Circuit, the Fifth Circuit has made "no effort to craft a bright-line rule" and instead "requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden." *Adkins*, 393 F.3d at 571. But unlike the Eighth and Tenth Circuits, the Fifth Circuit requires the government action to create some form of "pressure" – instead of simply inhibiting

religious expression – to constitute a substantial burden.

The Third Circuit recently concluded that "the Fifth Circuit in *Adkins* enunciated the proper standard for what constitutes a substantial burden." *Klem*, 497 F.3d at 280 n.7 (3d Cir. 2007). Under the Third Circuit's test:

> a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . versus abandoning one of the precepts of his religion . . . ; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Id. at 280. While the first prong of the Third Circuit's "disjunctive test," *id.*, incorporates the coercion-based test that the Ninth, Fourth, and D.C. Circuits apply, the Third Circuit determined that limiting itself to this narrow standard would not "accurately reflect the statute's plain text" or "effect its purpose." *Id.* at 280.

Finally, the Eleventh Circuit has formulated a standard that combines elements of the Ninth and Fifth Circuit's tests to create yet another definition of substantial burden. Expressly "declin[ing] to adopt the Seventh Circuit's definition" of the term, Eleventh Circuit law provides that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to *significant pressure* which *directly coerces* the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi, Inc. v. Town of*

Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) (emphasis added). It is unclear from this formulation whether "significant pressure" is enough to trigger RFRA or whether an individual must show "direct coercion." But contrary to the Ninth Circuit, the Eleventh Circuit believes that this Court's pre-*Smith* decisions do not offer definitive guidance on the subject because "[t]he Court's articulation of what constitutes a 'substantial burden' has varied over time." *Id.* at 1226.

B. The Conflict Is Entrenched.

Congress enacted RFRA in order to "establish *one standard* for testing claims of Government infringement on religious practices." S. Rep. No. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1898 (emphasis added). Yet the federal courts of appeals now concede that they define "substantial burden" differently. And there are no indications that the courts are likely to converge around a uniform test.

For example, upon surveying the approaches taken by other courts, a recent decision by the Third Circuit recognized that "[t]he courts of appeals to have addressed the definition of 'substantial burden' . . . have defined it in several ways." *Klem*, 497 F.3d at 279. Even within the intermediate category of courts described above, the court asserted that "[t]he standards from the Seventh and Eleventh Circuits appear to be at opposite ends of the definitional spectrum." *Id.* at 279 n.5. The Third Circuit then went on to endorse an approach it attributed to the Fifth Circuit, *id.* at 280 & n.7, although the language of the test it adopted varies considerably from Fifth Circuit law. *Compare Klem*, 497 F.3d at 280 (Third Circuit) *with*

Adkins, 393 F.3d at 570 (Fifth Circuit). This type of confused sorting and choosing without any hope of achieving consistency will continue until this Court fleshes out once and for all what RFRA's triggering requirement means.

II. This Case Is An Excellent Vehicle For Elucidating the Substantial Burden Test.

The undisputed facts of this case afford an ideal opportunity to resolve how to define RFRA's "substantial burden" requirement. The issue is the sole ground upon which the Ninth Circuit's decision is based. Furthermore, although the Fourth and D.C. Circuits follow the Ninth Circuit's approach to the "substantial burden" requirement, this case would come out differently in other circuits.

As the *Comanche* case above demonstrates, Petitioners would prevail under the test used in the Eighth and Tenth Circuits because spraying sewage water on their most sacred mountain would "significantly inhibit or constrain" their religious "expression." *Patel*, 515 F.3d at 813 (quoting *Murphy*, 372 F.3d at 988); *accord Werner*, 49 F.3d at 1480. Petitioners would no longer be able to worship the mountain as a spiritually pure giver of life. *See* Pet. App. 90a-91a (Fletcher, J. dissenting). Spraying reclaimed sewage water on the mountain also would significantly hinder religious "conduct." *Patel*, 515 F.3d at 813 (quoting *Murphy*, 372 F.3d at 988). For example, Navajo medicine men "would be unable to perform the fundamental Blessingway ceremony, because 'all [medicine] bundles will be affected'" by the mountain's desecration. Pet. App. 141-42a (panel opinion); *see also* Pet. App. 147a (panel opinion).

Petitioners might also prevail in the Seventh Circuit. Spraying sewage water on their most sacred mountain would render certain religious practices "effectively impracticable." *Urban Believers,* 342 F.3d at 761. Although tribal members would remain free to pray to the mountain and to gather natural resources from it, the mountain's spiritual contamination would drain prayers of meaning and render the mountain's resources effectively useless for ceremonial purposes. Pet. App. 139a (panel opinion).

Petitioners might also prevail in the Third, Fifth, and possibly even Eleventh Circuit. Spraying sewage water on the Peaks could be characterized as "pressur[ing] [them] to significantly modify [their] religious behavior and significantly violate [their] religious beliefs." *Adkins,* 393 F.3d at 570; *see also Midrash Sephardi,* 366 F.3d at 1227 ("a substantial burden can result" in the Eleventh Circuit "from pressure that tends to force adherents to forego religious precepts"). The mountain's desecration would pressure tribal members into altering their worship of the Peaks and forgoing their collecting ceremonial items and medicines from it. *See* Pet. App. 90a (Fletcher, J., dissenting).

III. Now Is The Time For This Court To Provide Guidance Respecting This Important Federal Statute.

For three reasons, this Court should not allow uncertainty over how to construe RFRA to persist in the federal circuits any longer.

1. This particular case alone involves the religious liberties of hundreds of thousands of Native

Americans. There are roughly 300,000 members of the Navajo Nation, making it the country's second most populous tribe. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2004-2005 38 (124th ed. 2005). Five additional tribes join the Navajo Nation as petitioners in this case, together representing approximately 100,000 more tribal members. And the Forest Service has acknowledged that the Peaks are sacred to at least seven more formally recognized tribes. Pet. App. 45a.

If the decision below is left standing, these Native American tribes will be irreparably injured. The Peaks "will from this time forward be desecrated and spiritually impure." Pet. App. 112a (Fletcher, J., dissenting). Indeed, the Forest Service has acknowledged that spraying reclaimed sewage water on the mountain, in the tribes' eyes, would "*irretrievabl[y]* impact" the mountain and thereby impose cultural harm that "may in fact be considered *irreversible* in nature." 2005 FEIS at 3-29 to 3-30 (first emphasis added). This is not a case in which further percolation is an acceptable response to legal uncertainty.

2. The Ninth Circuit's newly restrictive definition of "substantial burden" already is affecting litigation and causing friction between federal and tribal governments beyond this case. Just two months after the decision below was announced, the Ninth Circuit considered an Indian tribe's claim that a plan for a hydroelectric project would affect religious ceremonies relating to a waterfall. The court, applying the en banc decision at issue here, deemed it "irrelevant" that the project "interferes with the ability of tribal members to practice religion."

Snoqualmie Indian Tribe v. Federal Energy Regulatory Comm'n, 545 F.3d 1207, 1214 (9th Cir. 2008). Just as this Court often reviews appellate decisions portending profound consequences for states, this Court should at a minimum afford Indian tribes – as sovereigns and "domestic dependent nations," *Oklahoma Tax Comm'n v. Citizen Band Potowotami Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) – an opportunity be heard before the Ninth Circuit's new practice of refusing even to consider governmental impacts on tribes' centuries-old religious traditions takes hold.

3. The cacophony of definitions of substantial burden among the various circuits is bound to cause operational difficulties within federal agencies and courts. Entities ranging from the Bureau of Land Management to the Federal Energy Regulatory Commission must regularly consult and implement RFRA. The lack of any uniform conception of its triggering mechanism precludes these agencies from applying any clear and consistent view of the law.

The Ninth Circuit's divergence from the Tenth Circuit's definition of "substantial burden" creates particularly thorny administrability problems. Not only do the Ninth and Tenth Circuits border each other, but the Navajo Nation – which spans parts of Arizona, Utah, and New Mexico – occupies territory in both jurisdictions.[7] It is impractical, if not

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[7] Similarly, the Goshute Indian Reservation is located in both the Ninth and Tenth Circuits, straddling the Nevada-Utah border.

infeasible, for some on the Navajo reservation to have greater religious freedom rights than others.

IV. The Ninth Circuit's Definition of "Substantial Burden" Is Unduly Restrictive.

The Ninth Circuit's definition of "substantial burden" means that RFRA applies "only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of criminal or civil sanctions (*Yoder*)." Pet. App. 20a. This test is at odds with the statute's plain language and congressional purpose.

1. The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The term "substantial burden," according to dictionary definitions, means a "government action that 'hinders or oppresses' the exercise of religion 'to a considerable degree.' Pet. App. 55a (Fletcher, J., dissenting) (quoting BLACK'S LAW DICTIONARY 208 (8th ed. 2004) and AMERICAN HERITAGE DICTIONARY 1727 (4th ed. 2000)). The concept of "hindering or oppressing religious expression to a considerable degree" tracks the Tenth and Eighth Circuits' definition of "substantial burden" as a governmental action that "significantly inhibit[s] or constrain[s]" religious expression. *Werner*, 49 F.3d at 1480; *Weir*, 114 F.3d at 820.

Understanding a "substantial burden" as something that significantly oppresses or inhibits religious practices comports with this Court's description of RFRA in *City of Boerne v. Flores*, 521 U.S. 507

(1997). In *Boerne*, this Court recognized that Congress intended RFRA to apply, among other things, to "autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, and on zoning regulations and historic preservation laws . . . which, as an incident of their normal operation, have adverse effects on churches and synagogues." *Boerne*, 521 U.S. at 530-31 (citing the legislative history of RFRA, including S. Rep. No. 103-111, at 8 (1993)); *see also id.* at 535 (zoning law at issue imposed "substantial burden"). While these actions do not force anyone to act in any certain way, each of them offends religious adherents and hinders their religious experiences to a considerable degree. Likewise, spraying sewage water onto a religion's most holy site – whether it is the mountain at issue here, Mecca, the Western Wall, or even something less singularly sacred, such as St. Patrick's Cathedral – would quite obviously significantly oppress and inhibit religious expression.

2. The Ninth Circuit majority did not dispute that the governmental action at issue substantially burdens petitioners in the ordinary sense of the phrase. Pet. App. 29a-30a. Nor did it dispute that it was necessary to construe RFRA according to its plain meaning in order to accommodate the religious sensibilities that this Court acknowledged in *Boerne* that Congress intended to protect. But the Ninth Circuit asserted the power to disregard the plain meaning of the statute for two reasons: (a) the phrase "substantial burden" is "a term of art" that is restricted to the specific types of burdens imposed in *Sherbert* and *Yoder*; and (b) applying RFRA to land-based religious practices would give "each citizen" an

"individual veto to prohibit the government action solely because it offends his religious beliefs." Pet. App. 7a.

Neither of these contentions withstands scrutiny.

a. The phrase "substantial burden" is not a term of art with a specialized meaning limited to the types of burdens imposed in *Sherbert* and *Yoder*. Congress explained that RFRA's purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The second part of that statement – the part that refers to the substantial burden concept – makes no reference to *Sherbert* or *Yoder*. Nor would it have made any sense to do so: neither case ever uses the phrase. Thus, while the analyses in *Sherbert* and *Yoder* inform RFRA's "compelling interest" test, neither case establishes (much less limits in terms of its specific facts) what it means to substantially burden religious exercise.

To be sure, this Court occasionally used the term "substantial burden" in later, pre-*Smith* free exercise cases to describe the level of impact on religious exercise necessary to trigger strict scrutiny. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-85 (1990) (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). But even if one assumes that Congress meant for those decisions to supply meaning to RFRA, nothing in them suggests that this Court understood the concept of "substantial burden" any differently from the phrase's ordinary meaning. When referencing the

notion of a "substantial burden," this Court inquired into the ultimate *effect* of governmental action on individuals, not into the precise *type* of governmental action at issue. The ultimate question, as this Court put it, was whether the governmental action "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)) (emphasis removed).

RFRA takes the same approach: it "does not describe a particular *mechanism* by which religion cannot be burdened. Rather, RFRA prohibits government action with a particular *effect* on religious exercise." Pet. App. 55a (Fletcher, J., dissenting) (emphasis in original). No other approach would make sense. The government acts in myriad ways. And religious belief, contrary to the Ninth Circuit's suggestion (Pet. App. 6a), is *inherently* "subjective." Some religions are offended by autopsies; some are not. Some are intimately tied to certain landmarks; some are not. Therefore, the important question from the standpoint of religious freedom is simply whether governmental action significantly interferes with religious practices, not whether it happens to do so by the same means as a prior Supreme Court case.

Nothing in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), on which the Ninth Circuit relied so heavily, *see* Pet. App. 22a-27a, suggests otherwise. In *Lyng*, this Court held that the Forest Service's approval of a logging road through sacred tribal land did not violate the Free Exercise Clause. Although this Court never used the exact phrase "substantial burden," it explained that the

road would "interfere significantly" with tribal members' ability to pursue spiritual fulfillment. *Id.* at 449. Indeed, this Court assumed that building the road would have "devastating effects on traditional Indian practices" and would "virtually destroy the . . . Indians' ability to practice their religion." *Id.* at 451 (quotation marks omitted) (alterations in original). By any reasonable understanding of the English language, therefore, this Court accepted that the governmental action in *Lyng* would substantially burden tribal members' exercise of religion.

The tribal members ultimately lost in *Lyng* because this Court held that the Free Exercise Clause subjects governmental action to strict scrutiny only when the action actually "prohibit[s]" religious expression. *Id.* at 451; *see* U.S. CONST. amend I. The Clause does not "require the government to bring forward a compelling justification for its otherwise lawful actions" when those actions merely "make it *more difficult* to practice certain religions." *Id.* at 450 (emphasis added); *see also Smith*, 494 U.S. at 883 (explaining that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities"). Alternately stated, more than a substantial burden is necessary under the First Amendment for governmental action with an "incidental effect" on religion to trigger strict scrutiny. *Lyng*, 485 U.S. at 450-51.

RFRA, however, sets a softer threshold in cases involving federal governmental action for triggering strict scrutiny. RFRA applies, in this Court's words, whenever "the exercise of religion has been burdened in an incidental way," "without regard to whether [the law] stifl[es] or punish[es] free exercise."

Boerne, 521 U.S. at 534, 535; *see also* 42 U.S.C. 2000bb(b)(1) (strict scrutiny applies to "*all cases* where religious exercise is substantially burdened") (emphasis added). The Ninth Circuit misconstrued and gave improper weight to First Amendment precedent in holding otherwise.

b. The Ninth Circuit was likewise mistaken in asserting that if RFRA's "substantial burden" test were construed to effectuate its plain meaning, "[e]ach citizen would hold an individual veto to prohibit [] government[al] action solely because it offends his religious beliefs." Pet. App. 7a. Satisfying the "substantial burden" requirement merely triggers RFRA's "compelling interest" test. The government satisfies that test whenever it shows that an action that substantially burdens religious exercise "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1.

This Court has made clear that it is entirely "feasib[le]" to employ this "case-by-case" approach to challenged governmental action. *O Centro,* 546 U.S. at 436. Indeed, RFRA expressly contemplates that making an exception to accommodate one group does *not* mean that the government must accommodate all similar claims. *Id.*

It thus comes as no surprise that the government regularly satisfies the compelling interest test in cases involving religious liberty. A recent study found that federal courts subjecting governmental actions to strict scrutiny under RFRA or RLUIPA upheld the actions seventy-two percent of the time. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal*

Courts, 59 VAND. L. REV. 793, 860 (2006). Pre-RFRA case law dictates as much. In *United States v. Lee*, 455 U.S. 252 (1982), for example, this Court held the federal law assigning social security numbers is the least restrictive means of pursuing the "broad public interest in maintaining a sound tax system," and thus that the law is constitutional despite the fact that it "interferes with the free exercise rights of the Amish." *Id.* at 257, 260.

In *Lyng*, this Court similarly remarked that it was "difficult to see" how the Government could have been more accommodating of tribal religious practices in pursuing its interest in timber harvesting. 485 U.S. at 454. The Ninth Circuit made similar observations in *Snoqualmie Indian Tribe*, noting that "FERC considered several alternatives" and chose the option (short of decommissioning the entire hydroelectric project) that appeared to be the least burdensome means of achieving its goals. 545 F.3d at 1211.

Whether or not the governmental actions in *Lyng* and *Snoqualmie Indian Tribe* clearly were narrowly tailored to compelling interests, it *is* clear that the governmental actions in those cases are miles away from the Forest Service's action here. As the Ninth Circuit dissent explained without disagreement from the majority, the government hardly has a compelling interest in "expand[ing] and improv[ing]" an "already functioning commercial ski resort." Pet. App. 99a. This is exactly the kind of situation that RFRA is designed to address.

At any rate, insofar as interpreting RFRA in accordance with its plain meaning leads in some cases to restricting federal governmental actions that

are "valid under *Smith*," *Boerne*, 521 U.S. at 534, the desirability of that reality is one for Congress, not this Court, to assess. Congress has emphasized that it intends RFRA to be read broadly. *See* 42 U.S.C. § 2000bb(a)(5); *see also id.* § 2000cc-3(g) (declaring that RLUIPA "shall be construed in favor of a broad protection of religious exercise."). If Congress ever determines that RFRA's protections unduly burden the federal government, it may curtail those protections. Unless and until that happens, the Ninth Circuit's displeasure with congressional policy gives it no warrant to judicially narrow an intentionally "[s]weeping" statute. *Boerne*, 521 U.S. at 532.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15371
D.C. Nos. CV-05-01824-PGR
CV-05-01914-PGR
CV-05-01949-PGR
CV-05-01966-PGR

NAVAJO NATION; HAVASUPAI TRIBE; REX TILOUSI; DIANNA UQUALLA; SIERRA CLUB; WHITE MOUNTAIN APACHE NATION; YAVAPAI-APACHE NATION; THE FLAGSTAFF ACTIVIST NETWORK,

Plaintiffs-Appellants,

and

HUALAPAI TRIBE; NORRIS NEZ; BILL BUCKY PRESTON; HOPI TRIBE; CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE; NORA RASURE, in her official capacity as Forest Supervisor, Responsible Officer, Coconino National Forest; HARV FORSGREN, appeal deciding office, Regional Forester, in his official capacity,

Defendants-Appellees,

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,

Defendant-intervenor-Appellee.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15436
D.C. Nos. CV-05-01824-PGR
CV-05-01914-PGR
CV-05-01949-PGR
CV-05-01966-PGR

NAVAJO NATION; HUALAPAI TRIBE; NORRIS NEZ; BILL BUCKY PRESTON; HAVASUPAI TRIBE; REX TILOUSI; DIANNA UQUALLA; SIERRA CLUB; WHITE MOUNTAIN APACHE NATION; YAVAPAI-APACHE NATION; CENTER FOR BIOLOGICAL DIVERSITY; THE FLAGSTAFF ACTIVST NETWORK,

Plaintiffs,

and

HOPI TRIBE,

Plaintiff-Appellant,

v.

UNITED STATES FOREST SERVICE; NORA RASURE, in her official capacity as Forest Supervisor, Responsible Officer, Coconino National Forest; HARV FORSGREN, appeal deciding office, Regional Forester, in his official capacity,

Defendants-Appellees,

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,

Defendant-intervenor-Appellee.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15455
D.C. No. CV-05-01824-PGR

HUALAPAI TRIBE; NORRIS NEZ; BILL BUCKY PRESTON,
Plaintiffs-Appellants,

v.

UNITED STATES FOREST SERVICE; NORA RASURE, in her official capacity as Forest Supervisor, Responsible Officer, Coconino National Forest; HARV FORSGREN, appeal deciding office, Regional Forester, in his official capacity,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, *District Judge*, Presiding

Argued and Submitted
December 11, 2007—Pasadena, California

Filed August 8, 2008

Before:

Alex Kozinski, *Chief Judge*, Harry Pregerson, Diarmuid F. O' Scannlain, Pamela Ann Rymer, Andrew J. Kleinfeld, Barry G. Silverman, William A. Fletcher, Raymond C. Fisher, Richard R. Clifton, Carlos T. Bea, and Sandra S. Ikuta, *Circuit Judges.*

Opinion by Judge Bea;
Dissent by Judge W. Fletcher

COUNSEL

Howard M. Shanker (argued), Laura Lynn Berglan, The Shanker Law Firm, PLC, Tempe, Arizona; Jack F. Trope (argued), Association on American Indian Affairs, Rockville, Maryland; William C. Zukosky, DNA-People's Legal Services, Flagstaff, Arizona; Terence M. Gurley and Zackeree Kelin, DNA-People's Legal Services, Window Rock, Arizona; Lisa A. Reynolds, James E. Scarboro (argued), Arnold & Porter LLP, Denver, Colorado; Anthony S. Canty, Lynelle Kym Hartway, Office of General Counsel, The Hopi Tribe, Kykotsmovi, Arizona, for the plaintiffs-appellants.

Catherine E. Stetson (argued), Andrew L. Spielman, Hogan & Hartson LLP, Washington, DC; Janice M. Schneider, Bruce Babbitt, Latham & Watkins LLP, Washington, DC; Sue Ellen Wooldridge, Matthew J. McKeown, Andrew C. Mergen, Kathryn E. Kovacs, Lane M. McFadden (argued), United States Department of Justice, Environment & Natural Resources Division, Washington, DC; Philip A. Robbins, Paul G. Johnson, Michael J. O'Connor, John J. Egbert, Jennings, Strouss & Salmon, P.L.C., Phoenix, Arizona, for the defendants-appellees.

Geraldine Link, National Ski Areas Association, Lakewood, Colorado; Ezekiel J. Williams, Jacy T. Rock, Faegre & Benson LLP, Denver, Colorado; Glenn E. Porzak, P. Fritz Holleman, Eli A. Feldman, Porzak Browning & Bushong LLP, Boulder, Colorado; for the National Ski Areas Association as

Amicus Curiae in Support of the defendants-appellees.

William Perry Pendley, Mountain States Legal Foundation, Lakewood, Colorado; for the Mountain States Legal Foundation as Amicus Curiae in Support of the defendants-appellees.

OPINION

BEA, *Circuit Judge*:

In this case, American Indians ask us to prohibit the federal government from allowing the use of artificial snow for skiing on a portion of a public mountain sacred in their religion. At the heart of their claim is the planned use of recycled wastewater, which contains 0.0001% human waste, to make artificial snow.[1] The Plaintiffs claim the use of such snow on a sacred mountain desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities. We are called upon to decide whether this government-approved use of artificial snow on government-owned park land violates the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.* We hold that it does not, and affirm the district court's denial of relief on all grounds.

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[1] It appears that some of the Plaintiffs would challenge any means of making artificial snow, even if no recycled wastewater were used. Panel Oral Argument (Sept. 14, 2006) at 12:25-12:45 (Hopi Plaintiffs).

Plaintiff Indian tribes and their members consider the San Francisco Peaks in Northern Arizona to be sacred in their religion.[2] They contend that the use of recycled wastewater to make artificial snow for skiing on the Snowbowl, a ski area that covers approximately one percent of the San Francisco Peaks, will spiritually contaminate the entire mountain and devalue their religious exercises. The district court found the Plaintiffs' beliefs to be sincere; there is no basis to challenge that finding. The district court also found, however, that there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.

Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience. That is, the presence of the artificial snow on the Peaks is offen-

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[2] The Plaintiffs-Appellants in this case are the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, the White Mountain Apache Nation, Bill Bucky Preston (a member of the Hopi Tribe), Norris Nez (a member of the Navajo Nation), Rex Tilousi (a member of the Havasupai Tribe), Dianna Uqualla (a member of the Havasupai Tribe), the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network.

The Defendants-Appellees are the United States Forest Service; Nora Rasure, the Forest Supervisor; Harv Forsgren, the Regional Forester; and Intervenor Arizona Snowbowl Resort Limited Partnership.

sive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden"—a term of art chosen by Congress to be defined by reference to Supreme Court precedent —on the free exercise of religion. Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.

Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how

much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

I. Factual and Procedural Background[3]

The Snowbowl ski area ("the Snowbowl") is located on federally owned public land and operates under a special use permit issued by the United States Forest Service ("the Forest Service"). *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 883-84 (D. Ariz. 2006). Specifically, the Snowbowl is situated on Humphrey's Peak, the highest of the San Francisco Peaks ("the Peaks"), located within the Coconino National Forest in Northern Arizona. *Id.* at 869, 883. The Peaks cover about 74,000 acres. *Id.* at 883. The Snowbowl sits on 777 acres, or approximately one percent of the Peaks. *Id.* at 883-84.

The Forest Service designated the Snowbowl as a public recreation facility after finding the Snowbowl "represented an opportunity for the general public to access and enjoy public lands in a manner that the Forest Service could not otherwise offer in the form of a major facility anywhere in Arizona." *Id.* at 884. The

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[3] We find no clear error in the district court's findings of fact, so our statement of the facts is based on the district court opinion. The dissent cursorily asserts that "the majority misstates the evidence below," Dissent at 10077, but fails to cite any fact in the opinion that it claims to be misstated, or as to which the district court erred in its findings of fact.

Snowbowl has been in operation since the 1930s and is the only downhill ski area within the Coconino National Forest.[4] *Id.*

The Peaks have long-standing religious and cultural significance to Indian tribes. The tribes believe the Peaks are a living entity. *Id.* at 887. They conduct religious ceremonies, such as the Navajo Blessingway Ceremony, on the Peaks. *Id.* The tribes also collect plants, water, and other materials from the Peaks for medicinal bundles and tribal healing ceremonies. *Id.* According to the tribes, the presence of the Snowbowl desecrates for them the spirituality of the Peaks. *Id.* Certain Indian religious practitioners believe the desecration of the Peaks has caused many disasters, including the September 11, 2001 terrorist attacks, the Columbia Space Shuttle accident, and increases in natural disasters. *Id.*

This case is not the first time Indian tribes have challenged the operation of the Snowbowl. In 1981, before the enactment of RFRA, the tribes brought a challenge to the Forest Service's approval of a number of upgrades to the Snowbowl, including the installation of new lifts, slopes, and facilities. *See Wilson v. Block*, 708 F.2d 735, 739 (D.C. Cir. 1983).[5] The tribes asserted that the approved upgrades would

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[4] In addition to downhill skiing, many other activities are conducted on the Peaks: sheep and cattle grazing, timber harvesting, road building, mining, motorcross, mountain biking, horseback riding, hiking, and camping. *Navajo Nation*, 408 F. Supp. 2d at 884. Further, gas and electric transmission lines, water pipelines, and cellular towers are located on the Peaks. *Id.*

[5] At the time *Wilson* was decided, artificial snow from recycled wastewater was not used on the Snowbowl and was thus not at issue.

"seriously impair their ability to pray and conduct ceremonies upon the Peaks" and to gather from the Peaks sacred objects necessary to their religious practices. *Id.* at 740. According to the tribes, this constituted an unconstitutional burden on the exercise of their religion under the Free Exercise Clause of the First Amendment. *Id.*

The D.C. Circuit in *Wilson* rejected the Indian tribes' challenge to the upgrades. *Id.* at 739-45. Although the court noted that the proposed upgrades would cause the Indians "spiritual disquiet," the upgrades did not impose a sufficient burden on the exercise of their religion: "Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion." *Id.* at 741-42. The Indian tribes have continued to conduct religious activities on the Peaks ever since. *Navajo Nation*, 408 F. Supp. 2d at 884.

With this brief background, we turn to the Plaintiffs' challenge in this case. In 2002, the Snowbowl submitted a proposal to the Forest Service to upgrade its operations. *Id.* at 885. The proposal included a request for artificial snowmaking from recycled wastewater for use on the Snowbowl. *Id.* The Snowbowl had suffered highly variable snowfall for several years; this resulted in operating losses that threatened its ski operation. *Id.* at 884-85, 907. Indeed, the district court found that artificial snowmaking is "needed to maintain the viability of the Snowbowl as a public recreational resource." *Id.* at 907.

The recycled wastewater to be used for snowmaking is classified as "A+" by the Arizona Department of

Environmental Quality ("ADEQ").[6] *Id.* at 887. A+ recycled wastewater is the highest quality of recycled wastewater recognized by Arizona law and may be safely and beneficially used for many purposes, including irrigating school ground landscapes and food crops. *See* Ariz. Admin. Code R18-11-309 tbl. A. Further, the ADEQ has specifically approved the use of recycled wastewater for snowmaking. *Id.*

In addition to being used to make snow, the recycled wastewater also will be used for fire suppression on the Peaks. *Navajo Nation*, 408 F. Supp. 2d at 886. The pipeline that will transport the recycled wastewater to the Snowbowl will be equipped with fire hydrants to provide water for fire suppression in rural residential areas and to fight forest fires. *Id.* Further, a reservoir of recycled wastewater will be kept on the Snowbowl for forest fire suppression. *Id.*

The Forest Service conducted an extensive review of the Snowbowl's proposal. As part of its review, the Forest Service made more than 500 contacts with Indian tribes, including between 40 and 50 meetings, to determine the potential impact of the proposal on the

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[6] The recycled wastewater that will be used at the Snowbowl "will undergo specific advanced treatment requirements, including tertiary treatment with disinfection. In addition, the reclaimed water will comply with specific monitoring requirements, including frequent microbiological testing to assure pathogens are removed, and reporting requirements." *Navajo Nation*, 408 F. Supp. 2d at 887. Further, the recycled wastewater will "comply with extensive treatment and monitoring requirements under three separate permit programs: the Arizona Pollutant Discharge Elimination System ("AZPDES") Permit, the Arizona Aquifer Protection Permit Program, and the Water Reuse Program." *Id.*

tribes.[7] *Id.* at 885. In a December 2004 Memorandum of Agreement, the Forest Service committed to, among other things: (1) continue to allow the tribes access to the Peaks, including the Snowbowl, for cultural and religious purposes; and (2) work with the tribes periodically to inspect the conditions of the religious and cultural sites on the Peaks and ensure the tribes' religious activities on the Peaks are uninterrupted. *Id.* at 900-01.

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[7] Of course, the impact of the Snowbowl proposal on the American Indian tribes is not the only factor the Forest Service must consider in administering the Coconino National Forest. Congress has directed the Forest Service to manage the National Forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. Additionally, the Forest Service must follow a number of other directives under federal laws and executive orders in administering the Coconino National Forest, including, but not limited to: NEPA; NHPA; the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq.*; the National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497b; the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528 *et seq. Navajo Nation*, 408 F. Supp. 2d at 896.

The Forest Service's task is complicated by the number of sacred sites under its jurisdiction. In the Coconino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes. *Id.* at 897. The district court found the tribes hold other landscapes to be sacred as well, such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites. *Id.* Within the Southwestern Region forest lands alone, there are between 40,000 and 50,000 prehistoric sites. *Id.* The district court also found the Navajo and the Hualapai Plaintiffs consider the entire Colorado River to be sacred. *Id.* at 897-98. New sacred areas are continuously being recognized by the Plaintiffs. *Id.* at 898.

Following the review process, the Forest Supervisor approved the Snowbowl's proposal, including the use of recycled wastewater to make artificial snow, and issued a Final Environmental Impact Statement and a Record of Decision in February 2005. *Id.* at 885-86. The Plaintiffs appealed the Forest Supervisor's decision approving the Snowbowl's proposal to an administrative appeal board within the Forest Service. *Id.* In June 2005, the Forest Service issued its final administrative decision and affirmed the Forest Supervisor's approval of the proposed upgrades. *Id.* at 886.

After their unsuccessful administrative appeal, the Plaintiffs filed this action in federal district court. The Plaintiffs alleged that the Forest Service's authorization of the use of recycled wastewater on the Snowbowl violates: (1) RFRA; (2) NEPA; (3) NHPA; (4) ESA; (5) the Grand Canyon National Park Enlargement Act ("GCEA"), 16 U.S.C. § 228i; and (6) the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*[8] *Id.* at 871. Following cross-motions for summary judgment, the district court denied the Plaintiffs' motions for summary judgment and granted the Defendants' motion for summary judgment on all claims, except the RFRA claim. *Id.* at 869, 908.

After an 11-day bench trial on the RFRA claim, the district court held that the proposed upgrades, including the use of recycled wastewater to make artificial snow on the Peaks, do not violate RFRA. *Id.* at 883, 907. The district court found that the upgrades

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[8] On appeal, the Plaintiffs have abandoned their claims under the ESA, GCEA, and NFMA, leaving only the RFRA, NEPA, and NHPA claims.

did not bar the Plaintiffs' "access, use, or ritual practice on any part of the Peaks." *Id.* at 905. As a result, the court held that the Plaintiffs had failed to demonstrate the Snowbowl upgrade "coerces them into violating their religious beliefs or penalizes their religious activity," as required to establish a substantial burden on the exercise of their religion under RFRA. *Id.*

A three judge panel of this court reversed the district court in part, holding that the use of recycled wastewater on the Snowbowl violates RFRA, and in one respect, that the Forest Service failed to comply with NEPA. *See Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007). The panel affirmed the grant of summary judgment to the Defendants on four of five NEPA claims and the NHPA claim. *Id.* We took the case en banc to revisit the panel's decision and to clarify our circuit's interpretation of "substantial burden" under RFRA.

II. Standard of Review

We review *de novo* the district court's grant of summary judgment. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 804 (9th Cir. 1999). We review the district court's conclusions of law following a bench trial *de novo* and its findings of fact for clear error. *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004).

III. Religious Freedom Restoration Act of 1993

Plaintiffs contend the use of artificial snow, made from recycled wastewater, on the Snowbowl imposes a substantial burden on the free exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* We hold that the Plaintiffs have failed to establish a

RFRA violation. The presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, as required to establish a "substantial burden" on religious exercise under RFRA.[9]

RFRA was enacted in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990).[10] In *Smith*, the Supreme Court held that the Free Exercise Clause does not bar the government from burdening the free exercise of religion with a "valid and neutral law of general applicability." *Id.* at 879 (citation and internal quotation marks omitted). Applying that standard, the *Smith* Court rejected the Free Exercise Clause claims of the plaintiffs, who were denied state unemployment compensation after being discharged from their jobs for ingesting peyote for religious purposes. *Id.* at 890.

Congress found that in *Smith*, the "Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise im-

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[9] The Defendants do not contend RFRA is inapplicable to the government's use and management of its own land, which is at issue in this case. Because this issue was not raised or briefed by the parties, we have no occasion to consider it. Therefore, we assume, without deciding, that RFRA applies to the government's use and management of its land, and conclude there is no RFRA violation in this case.

[10] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court invalidated RFRA as applied to the States and their subdivisions, holding RFRA exceeded Congress's powers under the Enforcement Clause of the Fourteenth Amendment. *Id.* at 532, 536. We have held that RFRA remains operative as to the federal government. *See Guam v. Guerrero*, 290 F.3d 1210, 1220-22 (9th Cir. 2002).

posed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress further found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2). With the enactment of RFRA, Congress created a cause of action for persons whose exercise of religion is substantially burdened by a government action, regardless of whether the burden results from a neutral law of general applicability. *See id.* § 2000bb-1. RFRA states, in relevant part:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

To establish a prima facie RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an "exercise of religion." *See id.* § 2000bb-1(a). Second, the government action must "substantially burden" the plaintiff's exercise of religion. *See id.* If the plaintiff cannot prove

either element, his RFRA claim fails. Conversely, should the plaintiff establish a substantial burden on his exercise of religion, the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a "compelling governmental interest" and is implemented by "the least restrictive means." *See id.* § 2000bb-1(b). If the government cannot so prove, the court must find a RFRA violation.

We now turn to the application of these principles to the facts of this case. The first question is whether the activities Plaintiffs claim are burdened by the use of recycled wastewater on the Snowbowl constitute an "exercise of religion." RFRA defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A). The Defendants do not contest the district court's holding that the Plaintiffs' religious beliefs are sincere and the Plaintiffs' religious activities on the Peaks constitute an "exercise of religion" within the meaning of RFRA.

The crux of this case, then, is whether the use of recycled wastewater on the Snowbowl imposes a "substantial burden" on the exercise of the Plaintiffs' religion. RFRA does not specifically define "substantial burden." Fortunately, we are not required to interpret the term by our own lights. Rather, we are guided by the express language of RFRA and decades of Supreme Court precedent.

A.

Our interpretation begins, as it must, with the statutory language. RFRA's stated purpose is to "restore the compelling interest test as set forth in

Sherbert v. Verner, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). RFRA further states "the compelling interest test as set forth in . . . Federal court rulings [prior to *Smith*] is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5).

Of course, the "compelling interest test" cited in the above-quoted RFRA provisions applies only if there is a substantial burden on the free exercise of religion. That is, the government is not required to prove a compelling interest for its action or that its action involves the least restrictive means to achieve its purpose, unless the plaintiff first proves the government action substantially burdens his exercise of religion. The same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (noting the "free exercise inquiry asks whether government has placed a substantial burden" on the free exercise of religion (citing *Yoder* and other pre-*Smith* decisions)). Therefore, the cases that RFRA expressly adopted and restored—*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*—also control the "substantial burden" inquiry.

It is to those decisions we now turn.

B.

In *Sherbert*, a Seventh-day Adventist was fired by her South Carolina employer because she refused to work on Saturdays, her faith's day of rest. *Sherbert*, 374 U.S. at 399. Sherbert filed a claim for unem-

ployment compensation benefits with the South Carolina Employment Security Commission, which denied her claim, finding she had failed to accept work without good cause. *Id.* at 399-401. The Supreme Court held South Carolina could not, under the Free Exercise Clause, condition unemployment compensation so as to deny benefits to Sherbert because of the exercise of her faith. Such a condition unconstitutionally forced Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.[11]

In *Yoder*, defendants, who were members of the Amish religion, were convicted of violating a Wisconsin law that required their children to attend school until the children reached the age of sixteen, under the threat of criminal sanctions for the parents. *Yoder*, 406 U.S. at 207-08. The defendants sincerely believed their children's attendance in high school was "contrary to the Amish religion and way of life." *Id.* at 209. The Supreme Court reversed the defendants' convictions, holding the application of the compulsory school-attendance law to the defendants "unduly burden[ed]" the exercise of their religion, in

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[11] As the Supreme Court later elaborated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a *burden* upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless *substantial*.

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) (emphasis added) (discussing *Sherbert*).

violation of the Free Exercise Clause. *Id.* at 207, 220. According to the Court, the Wisconsin law "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218.

The Supreme Court's decisions in *Sherbert* and *Yoder*, relied upon and incorporated by Congress into RFRA, lead to the following conclusion: Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.

Applying *Sherbert* and *Yoder*, there is no "substantial burden" on the Plaintiffs' exercise of religion in this case. The use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*. The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*. The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service "has guaranteed that religious practitioners would still have access to the Snowbowl" and the rest of the

Peaks for religious purposes. *Navajo Nation*, 408 F. Supp. 2d at 905.

The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a "substantial burden" on the free exercise of religion.[12]

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[12] The dissent's assertion that we misunderstand the "nature of religious belief and practice" is misplaced. *See* Dissent at 10104. One need not study the writings of Sir Francis Bacon, *id.* at 10076, or William James, *id.* at 10105, to understand "religious exercise invariably, and centrally, involves a 'subjective spiritual experience.' " *Id.* at 10105. We agree with the dissent that spiritual fulfillment is a central part of religious exercise. We also note that the Indians' conception of their lives as intertwined with particular mountains, rivers, and trees, which are divine parts of their being, is very well explained in the dissent. Nevertheless, the question in this case is not whether a subjective spiritual experience constitutes an "exercise of religion" under RFRA. That question is undisputed: The Indians' religious activities on the Peaks, including the spiritual fulfillment they derive from such religious activities, are an "exercise of religion."

Rather, the sole question is whether a government action that affects only subjective spiritual fulfillment "substantially burdens" the exercise of religion. For all of the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not "substantially burden" religion.

The Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), is on point. In *Lyng*, Indian tribes challenged the Forest Service's approval of plans to construct a logging road

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Indeed, the Supreme Court in *Yoder* drew the same distinction between objective and subjective effect on religious exercise that the dissent criticizes us for drawing today: "Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a *subjective* point of view. It carries with it precisely the kind of *objective* danger to the free exercise of religion that the First Amendment was designed to prevent." *Yoder*, 406 U.S. at 218 (emphasis added). Contrary to the dissent's assertions, in *Yoder*, it was not the effect of the high school's secular education on the children's subjective religious sensibilities that constituted the undue burden on the free exercise of religion. Rather, the undue burden was the penalty of criminal sanctions on the parents for refusing to enroll their children in such school. *See Lyng*, 485 U.S. at 457 ("[T]here is nothing whatsoever in the *Yoder* opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature."); *Yoder*, 406 U.S. at 218 ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."). Likewise, in *Sherbert*, the protected interest was the receipt of unemployment benefits and not, as the dissent contends, the right to take religious rest on Saturday. *See Sherbert*, 374 U.S. at 410 ("This holding . . . reaffirms a principle that . . . no State may exclude . . . the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." (citations and internal quotation marks omitted)). The *Sherbert* Court certainly did not hold public employers were required not to work their Seventh-day Adventist employees on Saturdays, or not to fire them if they refused to work on Saturdays. Hence, the protected interest was not a mandatory day off, but the money from unemployment benefits that voluntarily taking the day off would otherwise forfeit.

in the Chimney Rock area of the Six Rivers National Forest in California. *Id.* at 442. The tribes contended the construction would interfere with their free exercise of religion by disturbing a sacred area. *Id.* at 442-43. The area was an "integral and indispensible part" of the tribes' religious practices, and a Forest Service study concluded the construction "would cause serious and irreparable damage to the sacred areas." *Id.* at 442 (citations and internal quotation marks omitted).

The Supreme Court rejected the Indian tribes' Free Exercise Clause challenge.[13] The Court held the government plan, which would "diminish the sacredness" of the land to Indians and "interfere significantly" with their ability to practice their religion, did not impose a burden "heavy enough" to violate the Free Exercise Clause. *Id.* at 447-49.[14] The plaintiffs were

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[13] That *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA. *See* 42 U.S.C. § 2000bb(a)(5) ("[T]he compelling interest test as set forth in . . . Federal court rulings [prior to *Smith*] is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.").

[14] Our dissenting colleague is therefore incorrect in his assertion that "*Lyng* did not hold that the road at issue would cause no 'substantial burden' on religious exercise." *See* Dissent at 10092. Although *Lyng* did not use the precise phrase "substantial burden," it squarely held the government plan did not impose a "burden . . . heavy enough" on religious exercise to trigger the compelling interest test: "It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion. Those respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compel-

not "coerced by the Government's action into violating their religious beliefs" (as in *Yoder*) nor did the "governmental action penalize religious activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges enjoyed by other citizens" (as in *Sherbert*). *See id.* at 449.

The *Lyng* Court, with language equally applicable to this case, further stated:

> The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices.
>
> * * *
>
> Even if we assume that . . . the [logging] road will "virtually destroy the . . . Indians' ability to practice their religion," the Constitution simply does not provide a principle that could justify upholding [the plaintiffs'] legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same ac-

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ling need [in its project.] We disagree." *Lyng*, 485 U.S. at 447. Thus, *Lyng* declined to require the government to show a compelling interest *because* the burden on the exercise of the Indians' religion was not "heavy enough" not, as the dissent asserts, *despite* the presence of a substantial burden on the exercise of their religion. *See* Dissent at 10092.

> tivities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion.
>
> * * *
>
> No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property.
>
> * * *
>
> The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. *Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.*

Id. at 451-53 (citation omitted) (last emphasis added).

Like the Indians in *Lyng*, the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment. Even were we to assume, as did the Supreme Court in *Lyng*, that the government action in this case will "virtually destroy the . . . Indians' ability to practice their religion," there is nothing to distinguish the road-building project in *Lyng* from the use of recycled wastewater on the Peaks. We simply cannot uphold the Plaintiffs' claims of interference with their faith and, at the same time, remain faithful to *Lyng*'s dictates.

According to the Plaintiffs, *Lyng* is not controlling in this RFRA case because the *Lyng* Court refused to apply the *Sherbert* test that was expressly adopted in RFRA. Hopi Br. at 40. In support, the Plaintiffs cite the Supreme Court's statement in *Smith* that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes." *Smith*, 494 U.S. at 883. This contention is unpersuasive.

"The *Sherbert* analysis" to which the Supreme Court referred in the quoted sentence from *Smith* is the *Sherbert* "compelling interest" test. *See id.* (noting that in recent cases, including *Lyng*, the Court had upheld the application of a valid and neutral law "regardless of whether it was necessary to effectuate a compelling interest" under *Sherbert*). But the *Sherbert* compelling interest test is triggered only when there is a cognizable burden on the free exercise of religion. *Lyng* declined to apply the compelling interest test from *Sherbert*, not because *Lyng* purported to overrule or reject *Sherbert*'s analysis, but because the burden on the exercise of religion that was present in *Sherbert* was missing in *Lyng*.

The *Lyng* Court held the government's road-building project in that case, unlike in *Sherbert*, did not deny the Plaintiffs "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449. In *Sherbert*, the plaintiff could not get unemployment compensation, available to all other South Carolinians. In *Lyng*, all park users, including the Indians, could use the new road and the lands to which it led. Because the government action did not "burden" the exercise of the Indians' religion, the *Lyng* Court had no occasion to require the gov-

ernment to present a compelling interest for its road-building. Thus, *Lyng* is consistent with the *Sherbert* standard codified in RFRA and forecloses the Plaintiffs' RFRA claims in this case.

Finally, the Supreme Court's pre-*Smith* decision in *Bowen v. Roy*, 476 U.S. 693 (1986), is also on point. In *Bowen*, the parents of an American Indian child brought a Free Exercise Clause challenge to the statutory requirement to obtain a Social Security Number for their daughter in order to receive certain welfare benefits. *Id.* at 695-96. The plaintiffs believed the government's use of a Social Security Number would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." *Id.* at 696. The *Bowen* Court rejected the plaintiffs' Free Exercise Clause claims and stated:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the plaintiffs] engage in any set form of religious observance, so [the plaintiffs] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government."

Id. at 699-700 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)) (emphasis in original).

The plaintiffs in *Bowen* could not force the government to alter its internal management procedures to identify their daughter by her name, even though they believed the use of a Social Security Number would prevent her from attaining greater spiritual power. It necessarily follows that the Plaintiffs in this case, despite their sincere belief that the use of recycled wastewater on the Peaks will spiritually desecrate a sacred mountain, cannot dictate the decisions that the government makes in managing "what is, after all, *its* land." *See Lyng*, 485 U.S. at 453 (emphasis in original).[15]

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[15] Our circuit's RFRA jurisprudence is consistent with the Supreme Court's pre-*Smith* precedent examined in this section. In *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), we held that a Guam statute criminalizing the importation of marijuana did not substantially burden the practice of Rastafarianism under RFRA, even though "marijuana use is sacramental in the practice of that religion." *Id.* at 1212-13, 1222-23. After noting "RFRA re-establishes the *Sherbert* standard," we defined "substantial burden" as "'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' including when, if enforced, it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'" *Id.* at 1218, 1222 (citation omitted) (quoting *Thomas*, 450 U.S. at 718; *Braunfeld*, 366 U.S. at 605). Applying this test, we held that the Guam statute did not substantially burden Guerrero's free exercise rights, because Rastafarianism does not require the importation, as distinguished from simple possession, of marijuana. *Id.* at 1223.

The dissent contends that our substantial burden standard is inconsistent with *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997). In *Mockaitis*, this court held that state prison officials substantially burden a Catholic priest's religious exercise under RFRA, when the officials intrude into the Sacrament of

C.

For six principal reasons, the Plaintiffs and the dissent would have us depart from the Supreme Court's pre-*Smith* jurisprudence in interpreting RFRA. We decline to do so and will address each of their contentions in turn.

First, the dissent asserts our interpretation of "substantial burden" is inconsistent with the dictionary definition of that term. Dissent at 10086-87. According to the dissent, "[b]ecause Congress did not define 'substantial burden,' either directly or by reference to pre-*Smith* case law, we should define . . . that term according to its ordinary meaning." *Id.* at 10089.

But here, Congress expressly referred to and restored a body of Supreme Court case law that defines what constitutes a substantial burden on the exercise of religion (i.e., *Sherbert*, *Yoder*, and other pre-*Smith* cases). *See* 42 U.S.C. §§ 2000bb(a)(4)-(5); 2000bb(b)(1).[16]

Penance by recording a confession from an inmate to a priest. *Id.* at 1530-31. *Mockaitis* cannot serve as precedent here for two reasons. First, its holding has been invalidated by the Supreme Court's decision in *City of Boerne*, where the Court found RFRA unconstitutional as applied to the States and their subdivisions. *See City of Boerne*, 521 U.S. at 532, 536. Second, we find *Mockaitis* unhelpful in formulating the substantial burden test. *Mockaitis* did not define substantial burden, let alone analyze the substantial burden standard under the *Sherbert/Yoder* framework restored in RFRA, nor did the decision attempt to explain why such framework should not apply to define substantial burden.

[16] "The dissent would limit the significance of Congress's citation of *Sherbert* and *Yoder* strictly to the content of what constitutes a compelling interest, not also when that test should be applied. But both *Sherbert* and *Yoder* use the same compelling interest test. If that is all Congress intended by the citation of

Thus, we must look to those cases in interpreting the meaning of "substantial burden." Further, the dissent's approach overlooks a well-established canon of statutory interpretation. Where a statute does not expressly define a term of settled meaning, "courts interpreting the statute must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] ter[m]." *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (citations and internal quotation marks omitted) (alterations in original). Here, Congress incorporated into RFRA a term of art—substantial burden—previously used in numerous Supreme Court cases in applying the Free Exercise Clause. The dissent would have us ignore this Supreme Court precedent and, instead, invent a new definition for "substantial burden" by reference to a dictionary. Dissent at 10086-87. This we cannot do. Rather, we must presume Congress meant to incorporate into RFRA the definition of "substantial burden" used by the Supreme Court.

Second, the dissent asserts that our definition of "substantial burden" is "restrictive" and cannot be found in *Sherbert*, *Yoder*, or any other pre-*Smith* case. Dissent at 10089-93.[17] The dissent contends it is

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the two cases, its citation of *Yoder* was redundant and superfluous. We "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). Hence, we apply the two separate and distinct substantial burden standards in *Sherbert* and *Yoder* to determine when the compelling interest test is invoked.

[17] Relatedly, the dissent states "*Sherbert* and *Yoder* used the word 'burden,' but nowhere defined, or even used, the phrase

"clear that RFRA protects against burdens that, while imposed by a different mechanism than those in *Sherbert* and *Yoder*, are also 'substantial.'" *Id.* at 10093.

For this purportedly "clear" proposition, the dissent cites no authority. That is, the dissent cannot point to a single Supreme Court case where the Court found a substantial burden on the free exercise of religion outside the *Sherbert/Yoder* framework. The reason is simple: There is none. In the pre-*Smith* cases adopted in RFRA, the Supreme Court has found a substantial burden on the exercise of religion *only* when the burden fell within the *Sherbert/Yoder* framework. *See Sherbert*, 374 U.S. at 403-06; *Yoder*, 406 U.S. at 207, 220; *Thomas*, 450 U.S. at 717-18 (applying *Sherbert*); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140-45 (1987) (applying *Sherbert*); *Frazee v. Ill. Dep't. of Employment Sec.*, 489 U.S. 829,

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'substantial burden.' " Dissent at 10090-91. The dissent is correct that neither *Sherbert* nor *Yoder* used the precise term "substantial burden." *Sherbert* held that a "burden" on the free exercise of religion requires the government to show a compelling interest, *Sherbert*, 374 U.S. at 403, and *Yoder* held that an "undu[e] burden[ ]" on the free exercise of religion does the same, *Yoder*, 406 U.S. at 220. For our purposes, however, this distinction is immaterial. Later Supreme Court cases have cited *Yoder* and other pre-*Smith* decisions for the proposition that only a "substantial burden" on the free exercise of religion triggers the compelling interest test. *See Hernandez*, 490 U.S. at 699 (noting the "free exercise inquiry asks whether government has placed a substantial burden" on the exercise of religion "and, if so, whether a compelling governmental interest justifies the burden" (citing *Yoder* and other pre-*Smith* decisions)); *see also Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384-85 (1990). Where the Supreme Court has equated the content of "substantial burden" to "burden" and "undue burden," we must do the same.

832-35 (1989) (applying *Sherbert*). Because Congress expressly restored pre-*Smith* cases in RFRA, we cannot conclude RFRA's "substantial burden" standard expands beyond the pre-*Smith* cases to cover government actions never recognized by the Supreme Court to constitute a substantial burden on religious exercise.[18]

Third, the Plaintiffs assert RFRA's compelling interest test includes a "least restrictive means" requirement, which "'was not used in the pre-*Smith* jurisprudence RFRA purported to codify.'" Hopi Br. at 31 (quoting *City of Boerne*, 521 U.S. at 535); *see also* Dissent at 10083. The Plaintiffs note that, whereas the government must establish only a compelling interest to withstand a Free Exercise Clause challenge, the government must establish both a compelling interest *and* the least restrictive means to withstand a RFRA challenge. That is true enough, but it puts the cart before the horse. The additional statutory requirement of a least restrictive means is triggered only by a finding that a substantial burden exists; that is the sole and threshold issue in this case. Absent a substantial burden, the government need not

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[18] For the same reason, the dissent is incorrect in its assertion that "[h]ad Congress wished to establish the standard employed by the majority, it could easily have stated that 'Government shall not, *through the imposition of a penalty or denial of a benefit*, substantially burden a person's exercise of religion.'" *See* Dissent at 10087 (emphasis in original). The addition of the italicized text would have been superfluous, because the cases Congress restored in RFRA recognize a substantial burden on the exercise of religion only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).

establish a compelling interest, much less prove it has adopted the least restrictive means.

Fourth, the Plaintiffs contend RFRA goes beyond the constitutional language that "forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden': a government may burden religion only on the terms set out by the new statute." Hopi Br. at 31-32 (quoting *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996)); *see also* Dissent at 10083. This contention ignores the Supreme Court's repeated practice of concluding a government action "prohibits" the free exercise of religion by determining whether the action places a "burden" on the exercise of religion.[19] Thus, the difference in the language of the Free Exercise Clause ("prohibit") and the language of RFRA ("burden") does not affect what constitutes a "burden" on the exercise of religion, under the very cases cited by RFRA as embodying the congressionally desired rule of decision.

Fifth, the Plaintiffs assert Congress expanded RFRA's definition of "exercise of religion" with the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*. Navajo Br. at 29; *see also* Dissent at 10083-84. Prior to RLUIPA's enactment, "exercise of religion" under RFRA meant "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (1994). The Free Exercise Clause of the

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[19] *See Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly *burdens* the free exercise of religion." (emphasis added)); *Sherbert*, 374 U.S. at 403 ("We turn first to the question whether the disqualification for benefits imposes any *burden* on the free exercise of appellant's religion." (emphasis added)).

First Amendment protects only "the observation of a *central* religious belief or practice." *Hernandez*, 490 U.S. at 699 (emphasis added).[20] RLUIPA, however, amended RFRA's definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A).

The Plaintiffs' assertion conflates two distinct questions under RFRA: (1) what constitutes an "exercise of religion" and (2) what amounts to a "substantial burden" on the exercise of that religion. The first question, that the Plaintiffs' activities are an "exercise of religion," is undisputed in this case. Of course, that question has no bearing on the second, "substantial burden," question. RFRA's amended definition of "exercise of religion" merely expands the scope of what may not be substantially burdened from "central tenets" of a religion to "any exercise of religion." It does not change what level or kind of interference constitutes a "substantial burden" upon such religious exercise.

Finally, the dissent attempts to justify its expansive interpretation of RFRA on the basis that RFRA applies "in all cases" where the free exercise of religion is burdened, whereas pre-*Smith* jurisprudence

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[20] Nevertheless, the *Hernandez* Court also cautioned: "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez*, 490 U.S. at 699; *see also Smith*, 494 U.S. at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"). In light of the Supreme Court's disapproval of "the centrality test," we have held the sincerity of a religious belief, not its centrality to a faith, determines whether the Free Exercise Clause applies. *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).

excluded entire classes of cases from scrutiny under the compelling interest test, e.g., prison and military regulations. Dissent at 10084. But no one disputes that RFRA applies here; it is not an issue. That RFRA applies to classes of cases in which the First Amendment's compelling interest test is inapplicable is irrelevant. This observation does not define what constitutes a "substantial burden" and, therefore, does not speak to the threshold question whether a "substantial burden" exists.

In sum, Congress's statutory command in RFRA to restore the Supreme Court's pre-*Smith* jurisprudence is crystal clear, and neither the dissent nor the Plaintiffs have offered any valid reason for departing from that jurisprudence in interpreting RFRA.

D.

In support of their RFRA claims, the Plaintiffs rely on two of our RLUIPA decisions. For two reasons, RLUIPA is inapplicable to this case. First, RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a "substantial burden" on the exercise of religion. *See* 42 U.S.C. §§ 2000cc; 2000cc-1; 2000cc-5(4)(A). Subject to two exceptions not relevant here,[21] RLUIPA does not apply to a federal government action, which is the only issue in this case. *See id.* § 2000cc-5(4). Second, even for state and local governments, RLUIPA applies only to government land-use regulations of private land—such as zoning laws—not to the government's

[21] Sections 2000cc-2(b) (burden of persuasion) and 2000cc-3 (rules of construction) apply also to the federal government. *See* 42 U.S.C. § 2000cc-5(4)(B).

management of its own land. *See id.* § 2000cc-5(5).[22] Nonetheless, even were we to assume the same "substantial burden" standard applies in RLUIPA and RFRA actions, the two RLUIPA cases cited by the Plaintiffs do not support their RFRA claims.[23]

First, in *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), an American Indian inmate brought a RLUIPA challenge against a prison policy requiring all male inmates to maintain their hair no longer than three inches. *Id.* at 991-92. Warsoldier refused to comply with the policy because of his "sincere religious belief that he may cut his hair only upon the death of a loved one," and was punished by confinement to his cell, the imposition of additional duty hours, and revocation of certain privileges. *Id.* at 991-92. We held the prison policy imposed a substantial burden on Warsoldier's exercise of his religion because it coerced him to violate his religious beliefs under the threat of punishment. *Id.* at 995-96.

Warsoldier is a straightforward application of the Supreme Court's decisions in *Sherbert* and *Yoder*. As in *Sherbert* and *Yoder*, Warsoldier was coerced to act contrary to his religious beliefs by the threat of sanctions (i.e., confinement to his cell and the imposition of additional duty hours), and forced to choose between following the tenets of his religion and receiving a governmental benefit (i.e., by the revocation of certain privileges in prison). In contrast, and as ana-

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[22] RLUIPA defines a "land use regulation" as "a *zoning or landmarking law* . . . that limits or restricts a claimant's use or development of land . . ., *if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land*." 42 U.S.C. § 2000cc-5(5) (emphasis added).

[23] Because RLUIPA is inapplicable to this case, we express no opinion as to the standards to be applied in RLUIPA actions.

lyzed above, the Plaintiffs in this case cannot show the use of recycled wastewater coerces them to violate their religious beliefs under the threat of sanctions, or conditions a government benefit upon conduct that would violate their religious beliefs.

Second, the Plaintiffs rely on our statement in *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), that, under RLUIPA, a "substantial burden" on a religious exercise must be "a significantly great restriction or onus upon such exercise." *Id.* at 1034. The Plaintiffs contend the use of recycled wastewater on the Peaks imposes a "significantly great restriction or onus" on the exercise of their religion.

San Jose Christian College's statement of the "substantial burden" test does not support the Plaintiffs' RFRA claims in this case. That "substantial burden" means a "significantly great restriction or onus" says nothing about what kind or level of restriction is "significantly great."[24] Instead, the "substantial bur-

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[24] The RLUIPA case cited by the dissent, *Shakur*, 514 F.3d 878, is not to the contrary. Dissent at 10094, 10099-10101. In *Shakur*, we held that a triable issue of fact existed as to whether prison officials' denial of Halal meat to Shakur, a Muslim inmate, imposed a "substantial burden" on his religious exercise. *Shakur*, 514 F.3d at 888-89. The prison offered Kosher meat meals to Jewish inmates, but denied Halal meat meals to Shakur. *Id.* at 883, 891. The alternative, vegetarian diet exacerbated Shakur's hiatal hernia and caused excessive gas that "interfere[d] with the ritual purity *required* for his Islamic worship." *Id.* at 888 (emphasis added). Contrary to the dissent's assertions, Dissent at 10099-10100, both meal choices provided to Shakur in prison were "unacceptable" to his religion—the non-Halal meat meals were forbidden by his religion and the Halal vegetarian meals interfered with the ritual purity required for his religious activities. *Shakur*, 514 F.3d at 889 (internal quotation marks omitted). Like the Seventh-day Adventist in *Sher-*

den" question must be answered by reference to the Supreme Court's pre-*Smith* jurisprudence, including *Sherbert* and *Yoder*, that RFRA expressly adopted. Under that precedent, the Plaintiffs have failed to show a "substantial burden" on the exercise of their religion, and thus failed to establish a prima facie RFRA claim. Accordingly, we affirm the district court's entry of judgment for the Defendants on the RFRA claim.[25]

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bert, who could obtain unemployment benefits only by working on Saturdays and thereby violating her religious tenets, Shakur could have a meal in prison and avoid starvation only if he violated his religious beliefs. Relying on *Sherbert* and *Thomas*, we held that there was a triable issue of fact as to whether the prison policy imposed a substantial burden on Shakur's religious exercise, because the policy conditioned a governmental benefit to which Shakur was otherwise entitled—a meal in prison—upon conduct that would violate Shakur's religious beliefs. *Id.* Thus, *Shakur* is a straightforward application of the *Sherbert* test and is consistent with the substantial burden standard we adopt today.

[25] As a last resort, the dissent invokes provocative soundbites, accusing us of "effectively read[ing] American Indians out of RFRA." Dissent at 10137. The dissent contends "the strength of the Indians' argument in this case could be seen more easily by the majority if another religion were at issue." *Id.* at 10105. In support, the dissent notes the use of artificial snow on the Peaks is no different than the government "permitt[ing] only" baptismal water contaminated with recycled wastewater for Christians or "permitt[ing] only" non-Kosher food for Orthodox Jews. *Id.* at 10105-06.

Putting aside the Equal Protection Clause violation that may arise from a law targeting only Christians or only Jews, the dissent's examples are clearly distinguishable. When a law "permits only" recycled wastewater to carry out baptisms or "permits only" non-Kosher food for Orthodox Jews, the government compels religious adherents to engage in activities repugnant to their religious beliefs under the penalty of sanctions. Such government compulsion is specifically prohibited by the Supreme

IV. National Environmental Policy Act of 1969

Plaintiffs contend the district court erred in granting summary judgment to the Defendants on five claims under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. We adopt the parts of the original three judge panel opinion affirming the district court's grant of summary judgment to the Defendants on the following four NEPA claims: (1) the Final Environmental Impact Statement ("FEIS") failed to consider a reasonable range of alternatives to the use of recycled wastewater; (2) the FEIS failed to discuss and consider the scientific viewpoint of Dr. Paul Torrence; (3) the FEIS failed adequately to consider the environmental impact of diverting the recycled wastewater from Flagstaff's regional aquifer; and (4) the FEIS failed adequately to consider the social and cultural impacts of the Snowbowl upgrades on the Hopi people. *See Navajo Nation*, 479 F.3d at 1054-59.

The remaining NEPA claim, which is raised only by the Navajo Plaintiffs, is that the FEIS failed adequately to consider the risks posed by human ingestion of artificial snow. The Navajo Plaintiffs' complaint did not include this NEPA claim or the factual allegations upon which the claim rests. The Navajo Plaintiffs raised this claim for the first time in their

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Court's decision in *Yoder*. A law permitting Indians to use only recycled wastewater in their religious or healing ceremonies would likewise constitute a substantial burden on their religious exercise. But there is no such law in this case. When the government allows the use of recycled wastewater on a ski area, it does not compel the Plaintiffs to act contrary to their religious tenets. The Plaintiffs remain free to use natural water in their religious or healing ceremonies and otherwise practice their religion using whatever resources they may choose.

motion for summary judgment. In their opposition to the Navajo Plaintiffs' summary judgment motion, the Defendants contended the Navajo Plaintiffs had failed to raise this NEPA claim in their complaint. In response, the Navajo Plaintiffs moved to amend their complaint to add a distinct and new NEPA cause of action claiming for the first time that the FEIS failed to consider the risks posed by human ingestion of artificial snow. The district court denied the Navajo Plaintiffs' motion to amend and did not address this NEPA claim on the merits. *Navajo Nation*, 408 F. Supp. 2d at 908. The Navajo Plaintiffs failed to appeal the district court's denial of their motion to amend, and therefore, the district court's denial of said motion is not before us.

Further, on this appeal, the Navajo Plaintiffs do not explain why their complaint is otherwise sufficient to state this NEPA claim—despite the Defendants' assertions that the Navajo Plaintiffs failed to plead this NEPA claim.[26] Indeed, the Navajo Plaintiffs concede "the specific allegations at issue were not included" in their complaint. Navajo Reply Br. at

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[26] The dissent quotes a sentence from the Navajo Plaintiffs' reply brief that cursorily states this NEPA claim was " 'properly pled' " in the district court. Dissent at 10130 (quoting Navajo Reply Br. at 23). Nevertheless, the Navajo Plaintiffs' reply brief does not state what words in the complaint are sufficient to plead this NEPA claim, nor does the brief cite any case or rule that makes it so. It is well-established that a bare assertion in an appellate brief, with no supporting argument, is insufficient to preserve a claim on appeal. *See Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 n.1 (9th Cir. 2008). The dissent's advocacy of why the Navajo Plaintiffs' complaint satisfies the notice pleading requirements of Federal Rule of Civil Procedure 8(a) is the dissent's own invention and disregards the rule that we do not manufacture arguments for an appellant. *See id.*

23-24. Rather, the Navajo Plaintiffs assert this NEPA claim was adequately presented to the district court because the claim "was briefed at summary judgment by all parties and presented at oral argument [to the district court]." *Id.* at 24. Nevertheless, our precedents make clear that where, as here, the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court. *See, e.g.*, *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("'Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.'"); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006) (holding that the complaint did not satisfy the notice pleading requirements of Federal Rule of Civil Procedure 8(a) because the complaint "gave the [defendants] no notice of the specific factual allegations presented for the first time in [the plaintiff's] opposition to summary judgment").[27] Because the Navajo Plaintiffs failed sufficiently to present this NEPA claim to the district court and also failed to appeal the district court's denial of their motion to amend the complaint to add this NEPA claim, the claim is waived on appeal. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007).

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[27] The dissent notes that the Navajo Plaintiffs raised the issue of human ingestion of artificial snow during the preparation of the FEIS and in the administrative appeal. Dissent at 10127-29. This, of course, is irrelevant to the question whether this claim was presented to the *district court*. A party may raise a claim at the administrative proceedings, but forego that claim on judicial review. Further, presenting a claim during the administrative proceedings does not put the defendants on notice that such claim will also be raised before the district court.

Accordingly, we affirm the district court's grant of summary judgment to the Defendants on all NEPA claims.

V. National Historic Preservation Act

Finally, the Plaintiffs contend the district court erred in granting summary judgment to the Defendants on their claim under the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq*. We adopt the part of the original three judge panel opinion affirming the district court's grant of summary judgment to the Defendants on the NHPA claim. *See Navajo Nation*, 479 F.3d at 1059-60.

VI. Conclusion

We affirm the district court's entry of judgment in favor of the Defendants on the RFRA claim, and the district court's grant of summary judgment to the Defendants on the NEPA and the NHPA claims.

AFFIRMED.

W. FLETCHER, Circuit Judge, dissenting, joined by Judge Pregerson and Judge Fisher:

The en banc majority today holds that using treated sewage effluent to make artificial snow on the most sacred mountain of southwestern Indian tribes does not violate the Religious Freedom Restoration Act ("RFRA"). It also holds that a supposed pleading mistake prevents the tribes from arguing under the National Environmental Protection Act ("NEPA") that the Forest Service failed to consider the likelihood that children and others would ingest snow made from the effluent. I dissent from both holdings.

I. Religious Freedom Restoration Act

> [D]ivers great learned men have been heretical, whilst they have sought to fly up to the secrets of the Deity by the waxen wings of the senses.
>
> – Sir Francis Bacon, *Of the Proficience and Advancement of Learning, Divine and Human* (Book I, 1605).

The majority holds that spraying 1.5 million gallons per day of treated sewage effluent on the most sacred mountain of southwestern Indian tribes does not "substantially burden" their "exercise of religion" in violation of RFRA. According to the majority, "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies . . . would be physically affected" by the use of the treated sewage effluent. Maj. op. at 10041. According to the majority, the "sole effect" of the dumping of the treated sewage effluent is on the Indians' "subjective spiritual experience." *Id.* at 10041. The majority holds:

> [T]he presence of the artificial snow on the Peaks is offensive to the Plaintiffs' mental and emotional feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden" . . . on the free exercise of religion. Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.

Id. In so holding, the majority misstates the evidence below, misstates the law under RFRA, and misunderstands the very nature of religion.

A. Background

The San Francisco Peaks in northern Arizona have longstanding religious significance to numerous Indian tribes of the American Southwest. Humphrey's Peak, Agassiz Peak, Doyle Peak, and Fremont Peak form a single large mountain commonly known as the San Francisco Peaks, or simply the Peaks. Humphrey's Peak is the highest point in Arizona.

The Peaks lie within the 1.8 million acres of the Coconino National Forest. In 1984, Congress designated 18,960 acres of the Peaks as the Kachina Peaks Wilderness. The Forest Service has identified the Peaks as eligible for inclusion in the National Register of Historic Places and as a "traditional cultural prop-

erty." The Service has described the Peaks as "a landmark upon the horizon, as viewed from the traditional or ancestral lands of the Hopi, Zuni, Acoma, Navajo, Apache, Yavapai, Hualapai, Havasupai, and Paiute."

The Forest Service has acknowledged that the Peaks are sacred to at least thirteen formally recognized Indian tribes, and that this religious significance is of centuries' duration. There are differences among these tribes' religious beliefs and practices associated with the Peaks, but there are important commonalities. As the Service has noted, many of the tribes share beliefs that water, soil, plants, and animals from the Peaks have spiritual and medicinal properties; that the Peaks and everything on them form an indivisible living entity; that the Peaks are home to deities and other spirit beings; that tribal members can communicate with higher powers through prayers and songs focused on the Peaks; and that the tribes have a duty to protect the Peaks.

The Arizona Snowbowl is a ski area on Humphrey's Peak, the most sacred of the San Francisco Peaks. Organized skiing has existed at the Arizona Snowbowl since 1938. In 1977, the then-owner of the Snowbowl requested authorization to clear 120 acres of new ski runs and to do other development. In 1979, after preparing an Environmental Impact Statement, the Forest Service authorized the clearing of 50 of the 120 requested acres, the construction of a new lodge, and some additional development. An association of Navajo medicine men, the Hopi tribe, and two nearby ranch owners brought suit under, *inter alia*, the Free Exercise Clause of the First Amendment and NEPA. The D.C. Circuit upheld the Forest Service's decision. *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983). In

Wilson, the court applied only the First Amendment, for RFRA did not yet exist. The then-proposed expansion of the Snowbowl did not involve any use of treated sewage effluent.

Until now, the Snowbowl has always depended on natural snowfall. In dry years, the operating season is short, with few skiable days and few skiers. The driest year in recent memory was 2001-02, when there were 87 inches of snow, 4 skiable days, and 2,857 skiers. Another dry year was 1995-96, when there were 113 inches of snow, 25 skiable days, and 20,312 skiers. By contrast, in wet years, there are many skiable days and many skiers. For example, in 1991-92, there were 360 inches of snow, 134 skiable days, and 173,000 skiers; in 1992-93, there were 460 inches of snow, 130 skiable days, and 180,062 skiers; in 1997-98, there were 330 inches of snow, 115 skiable days, and 173,862 skiers; and in 2004-05, there were 460 inches of snow, 139 skiable days, and 191,317 skiers.

ASR, the current owner, purchased the Snowbowl in 1992 for $4 million, with full knowledge of weather conditions in northern Arizona. In September 2002, ASR submitted a development proposal to the Forest Service. In February 2005, the Forest Service issued a Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD"). The ROD approved the development alternative preferred by ASR, which included a proposal to make artificial snow using treated sewage effluent.

Under the alternative approved in the ROD, the City of Flagstaff would provide the Snowbowl with up to 1.5 million gallons per day of its treated sewage effluent — euphemistically called "reclaimed water" — from November through February. A 14.8-mile pipeline would be built between Flagstaff and the Snow-

bowl to carry the treated effluent. The Snowbowl would be the first ski resort in the nation to make artificial snow entirely from undiluted treated sewage effluent.

Before treatment, raw sewage consists of waste discharged into Flagstaff's sewers by households, businesses, hospitals, and industries. The FEIS describes the treatment performed by Flagstaff:

> In the primary treatment stage, solids settle out as sludge . . . . Scum and odors are also removed . . . . Wastewater is then gravity-fed for secondary treatment through the aeration/denitrification process, where biological digestion of waste occurs . . . . in which a two-stage anoxic/aerobic process removes nitrogen, suspended solids, and [digestible organic matter] from the wastewater. The secondary clarifiers remove the by-products generated by this biological process, recycle microorganisms back into the process from return activated sludge, and separate the solids from the waste system. The waste sludge is sent to [a different plant] for treatment. The water for reuse then passes through the final sand and anthracite filters prior to disinfection by ultraviolet light radiation. . . . Water supplied for reuse is further treated with a hypochlorite solution to assure that residual disinfection is maintained . . . .

The effluent that emerges after treatment by Flagstaff satisfies the requirements of Arizona law for "reclaimed water." However, as the FEIS explains, the treatment does not produce pure water:

> Fecal coliform bacteria, which are used as an indicator of microbial pathogens, are typically

found at concentrations ranging from 10^5 to 10^7 colony-forming units per 100 milliliters (CFU/100 ml) in untreated wastewater. Advanced wastewater treatment may remove as much as 99.9999+ percent of the fecal coliform bacteria; however, the resulting effluent has detectable levels of enteric bacteria, viruses, and protazoa, including Cryptosporidium and Giardia.

Under Arizona law, the treated sewage effluent must be free of "detectable fecal coliform organisms" in only "four of the last seven daily reclaimed water samples." Ariz. Admin. Code § R1 8-11-303(B)(2)(a). The FEIS acknowledges that the treated sewage effluent also contains "many unidentified and unregulated residual organic contaminants." Treated sewage effluent may be used for many things, including irrigation and flushing toilets, but the Arizona Department of Environmental Quality ("ADEQ") requires that precautions be taken to avoid ingestion by humans.

Under the alternative approved in the ROD, treated sewage effluent would be sprayed on 205.3 acres of Humphrey's Peak during the ski season. In November and December, the Snow-bowl would use the effluent to build a base layer of artificial snow. The Snowbowl would then make more snow from the effluent depending on the amount of natural snowfall. The Snowbowl would also construct a reservoir on the mountain with a surface area of 1.9 acres to hold treated sewage effluent. The stored effluent would allow snowmaking to continue after Flagstaff cuts off the supply at the end of February.

B. Religious Freedom Restoration Act

Under the Religious Freedom Restoration Act of 1993 ("RFRA"), the federal government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). "Exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Subsection (b) of § 2000bb-1 provides, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

These provisions of RFRA were prompted by two Supreme Court decisions. RFRA was originally adopted in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, an Oregon statute denied unemployment benefits to drug users, including Indians who used peyote in religious ceremonies. *Id.* at 890. The Court held that the Free Exercise Clause of the First Amendment does not prohibit burdens on religious practices if they are imposed by laws of general applicability such as the Oregon statute. Characterizing its prior cases striking down generally applicable laws as "hybrid" decisions invoking multiple constitutional interests, the Court refused to subject facially neutral regulations to strict scrutiny when challenged solely under the First Amendment. *Id.* at 881-82, 885-86. However, the Court acknowledged that although the Constitution does not require a "compel-

ling government interest" test in such a case, Congress could impose one. *Id.* at 890.

In RFRA, enacted three years later, Congress made formal findings that the Court's decision in *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," and that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." Pub. L. No. 103-141, § 2(a), 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb(a)). Congress declared that the purposes of RFRA were "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2(b), 107 Stat. at 1488 (codified at 42 U.S.C. § 2000bb(b)). In this initial version of RFRA, adopted in 1993, Congress defined "exercise of religion" as "exercise of religion under the First Amendment to the Constitution." *Id.* § 5, 107 Stat. at 1489 (codified at 42 U.S.C. § 2000bb-2(4) (1994) (repealed)).

In 1997, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress's authority under § 5 of the Fourteenth Amendment. *Id.* at 529, 534-35. The Court did not, however, invalidate RFRA as applied to the federal government. *See Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002). Three years later, in response to *City of Boerne*, Congress enacted the

Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc *et seq.*). RLUIPA replaced RFRA's original First Amendment definition of "exercise of religion" with the broader statutory definition quoted above. RLUIPA §§ 7- 8, 114 Stat. at 806-07. Under RFRA after its amendment by RLUIPA, "exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), 2000cc-5(7)(A).

In several ways, RFRA provides greater protection for religious practices than did the Supreme Court's pre-*Smith* cases, which were based solely on the First Amendment. First, RFRA "goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden.' " *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) (as amended). *Cf.* U.S. Const. amend. 1 ("Congress shall make no law . . . prohibiting the free exercise [of religion]."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("The crucial word in the constitutional text is 'prohibit' . . . .").

Second, as the Supreme Court noted in *City of Boerne*, RFRA provides greater protection than did the First Amendment under the pre-*Smith* cases because "the Act imposes in every case a least restrictive means requirement — a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 521 U.S. at 535.

Third, in passing RLUIPA in 2000, Congress amended RFRA's definition of "exercise of religion." Under the amended definition — "any exercise of religion, whether or not compelled by, or central to, a

system of religious belief" — RFRA now protects a broader range of conduct than was protected under the Supreme Court's interpretation of "exercise of religion" under the First Amendment. *See Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 995 n.21 (9th Cir. 2006) (noting same). After 2000, RFRA plaintiffs must still prove that the burden on their religious exercise is "substantial," but the difficulty of showing a substantial burden is decreased because a broader range of religious exercise is now protected under RFRA. That is, some governmental actions were not previously considered burdens because they burdened non-protected religious exercise. Given the new broader definition of statutorily protected "exercise of religion," those actions have now become burdens within the meaning of RFRA.

Finally, and perhaps most important, RFRA provides broader protection because it applies *Sherbert* and *Yoder*'s compelling interest test "in all cases" where the exercise of religion is substantially burdened. 42 U.S.C. § 2000bb(b). Prior to *Smith*, the Court had refused to apply the compelling interest analysis in various contexts, exempting entire classes of free exercise cases from such heightened scrutiny. *See, e.g.*, *Lyng*, 485 U.S. at 454; *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Goldman v. Weinberger*, 475 U.S. 503, 507- 08 (1986); *see also Smith*, 494 U.S. at 883 ("In recent years, we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."). RFRA rejected the categorical barriers to strict scrutiny employed in those cases.

C. The Majority's Misstatements of the Law under RFRA

The majority misstates the law under RFRA in three ways. First, it concludes that a "substantial burden" on the "exercise of religion" under RFRA occurs only when the government "has coerced the Plaintiffs to act contrary to their religious beliefs under threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs." Maj. op. at 10042. Second, it ignores the impact of RLUIPA, and cases interpreting RLUIPA, on the definition of a "substantial burden" on the "exercise of religion" in RFRA. Third, it treats as an open question whether RFRA applies to the federal government's use of its own land. I discuss these misstatements in turn.

1. Definition of "Substantial Burden"

Neither RFRA nor RLUIPA defines "substantial burden."[1] RFRA states,

> The purposes of [RFRA] are —
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious freedom is substantially burdened by government.

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[1] Although the majority opinion uses the noun phrase "substantial burden," RFRA employs the verb phrase "substantially burden." Because the distinction is not material, I use the terms interchangeably.